IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5112 of 2000

with

SPECIAL CIVIL APPLICATION Nos.4982 of 2000
to 4987 of 2000
with
Special Civil Application Nos.5061 of 2000, 5062 of 2000, 5063 of 2000, 5065 of 2000, 5066 of 2000, 5067 of 2000, 5070 of 2000 and 5083 of 2000

with

Special Civil Application Nos.5113 of 2000, 5114 of 2000, 5115 of 2000, 5180 of 2000, 5239 of 2000, 5365 of 2000, 5812 of 2000 and 5903 of 2000.

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL
and
Hon'ble MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgement? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

LUCKY STAR INTERNATIONAL

Versus

UNION OF INDIA

Appearance:

Mr.Mihir J. Thakore, Senior Advocate, with Mr.P.M.Dave for the petitioners in Spl.C.A.No.5083 of 2000.

Mr.Mihir J. Thakore, Senior Advocate, with MR RS DINKAR for the Petitioners in rest of the matters.

MR AKSHAY H MEHTA with MR ASIM J PANDYA for the Respondents in all matters.

CORAM : MR.JUSTICE B.C.PATEL
and
MR.JUSTICE P.B.MAJMUDAR

Date of decision: 06/07/2000

ORAL JUDGEMENT: (Per B.C. Patel, J.)

1. Rule in Special Civil Application Nos. 5239 of 2000, 5365 of 2000, 5812 of 2000 and 5903 of 2000. Mr. Asim Pandya waives service of Rule on behalf of the respondents.

2. These matters are filed against the respondents challenging the legality and validity of the Circular No.38/2000-Cus. dated 10th May, 2000 issued by the Government of India.

3. Short facts required to be considered for disposal of these matters are taken from Special Civil Application No.5112 of 2000.

Petitioners are engaged in reprocessing and manufacturing Plastic Agglomerates/Granules out of plastic scrap. Petitioners are also selling their goods in Domestic Tariff Area (DTA) on payment of duties in terms of EXIM Policy and the provisions of the Central Excise Act, 1944 and the Customs Act, 1962. The goods manufactured in 100% Export Oriented Units (EOUs) or those manufactured in the Export Processing Zone (EPZ) are liable to duties of excise equivalent to the aggregate of duties of customs, which would be leviable under Section 12 of the Customs Act, 1962 or any other law applicable. Petitioners are paying duties in respect of goods sold in Domestic Tariff Area. Petitioners are also paying additional duty, which is known as "Countervailing Duty" (CVD) under Section 3 of the Customs Tariff Act, 1975, which is equivalent to the excise duty for the time being leviable on a like article, if produced or manufactured in India. Petitioners were exempted, however, by Circular No.38/2000, the Commissioners of Customs were requested

to recover short levy by reviewing the D.T.A. clearance made by plastic processors like the petitioners. It is this Circular Annexure `A' dated 10th May, 2000, which is the subject matter before the Court.

4. Annexure `A' refers to following aspects :-

(i) That a doubt was raised regarding levy of additional duty of customs (CVD) on DTA sale of reprocessed plastic agglomerates / granules (reprocessed out of plastic scrap) by EOU/EPZ units;

(ii) Doubt has arisen in relation to exemption of plastic materials falling under heading Nos. 39.01 to 39.14 under Notification Nos. 5/98-CE dated 2.6.1998 (ref. S.No.63), 5/99-CE dated 28.2.1999 (ref : S.No.64) and 6/2000-CE dated 1.3.2000 (ref: S.No.63);

(iii) By circular, it was pointed out that the notification enjoins fulfilment of two conditions for availing of the exemption, viz. (a) reprocessing of plastic scrap material should be done in India; and (b) plastic scrap or waste should be of the goods falling within Chapters 39, 54, 55, 56, 59, 64, 84, 85, 86, 87, 90, 91, 92, 93, 95 and 96 of the Customs Tariff.

5. By the Circular, it was pointed out that Condition No.1 has not been satisfied as the reprocessing has not been done in India. This Circular was issued calling upon the Assessing Officers to review the cases and recover the short levy.

6. Petitioners have their units within the Kandla Free Trade Zone or Export Processing Zone and it cannot be disputed by the respondents that Kandla Free Trade Zone or the Export Processing Zone are within the territorial limits of India. It cannot be argued by the respondents that Kandla Free Trade Zone or the Export Processing Zone do not form part of this country. The Central Excise Act, 1944 extends to the whole of India. So far as levy and collection of duty is concerned, the relevant part of Section 3 of Chapter II being relevant is reproduced hereunder :-

> "Section 3. Duties specified in the Schedule to the Central Excise Tariff Act, 1985 to be levied. (1) There shall be

levied and collected in such manner as may be prescribed duties of excise on all excisable goods which are produced or manufactured in India as, and at the rates, set forth in the Schedule to the Central Excise Tariff Act, 1985 :

Provided that the duties of excise which shall be levied and collected on any excisable goods which are produced or manufactured,-

(i) in a free trade zone and brought to any other place in India; or

(ii) by a hundred per cent export-oriented undertaking and allowed to be sold in India,

shall be an amount equal to the aggregate of the duties of customs which would be leviable under the Customs Act, 1962 (52 of 1962) or any other law for the time being in force, on like goods produced or manufactured outside India if imported into India, and where the said duties of customs are chargeable by reference to their value; the value of such excisable goods shall, notwithstanding anything contained in any other provisions of this Act, be determined in accordance with the provisions of the Customs Act, 1962 (52 of 1962) and the Customs Tariff Act, 1975 (51 of 1975).

... ..."

Reading Section 3, it becomes very clear that the Revenue is entitled to levy and collect in such manner as prescribed duties of excise on all excisable goods, which are produced or manufactured in India. However, so far as the goods which are produced or manufactured in Kandla Free Trade Zone and are brought to any other place in India are concerned, they are covered by the proviso to Section 3(1) of the Central Excise Act, 1944. It is the case of the petitioners that they are paying customs duty and excise duty for the goods which they are bringing to other parts of India after manufacturing in Kandla Free Trade Zone. On behalf of the Revenue, the same position is accepted. So far as the countervailing duty is concerned, the petitioners have raised their grievances

and one will have to refer to Section 3 of the Customs Tariff Act, 1975. Sub-section (1) with Explanation of Section 3, being relevant, is reproduced hereunder :-

> "Section 3. Levy of additional duty equal to excise duty.- (1) Any article which is imported into India shall, in addition, be liable to a duty (hereafter in this section referred to as the additional duty) equal to the excise duty for the time being leviable on a like article if produced or manufactured in India and if such excise duty on a like article is leviable at any percentage of its value, the additional duty to which the imported article shall be so liable shall be calculated at that percentage of the value of the imported article.
>
> Explanation.- In this section, the expression "the excise duty for the time being leviable on a like article if produced or manufactured in India" means the excise duty for the time being in force which would be leviable on a like article if produced or manufactured in India, or, if a like article is not so produced or manufactured, which would be leviable on the class or description of articles to which the imported article belongs, and where such duty is leviable at different rates, the highest duty.
>
> ... ..."

(emphasis supplied)

Reading the provision, it is very clear that the article, if it is imported into India, will attract the duty equal to the excise duty for the time being leviable on a like article, if produced or manufactured in India. It is necessary to refer to Notification No.6/2000-C.E., dated 1.3.2000 as it finds its place in Central Excise Tariff of India 2000-2001. In exercise of the power conferred by sub-section (1) of Section 5A of the Central Excise Act, 1944, the Central Government has issued the said notification. The relevant portion of the table is required to be reproduced :-

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S.No.	Chapter or heading No. or sub-heading No.	Description of goods	Rate under the First Schedule	Rate under the Second Schedule	Condition No.
... ...					
63.	39.01 to 39.14	Plastic materials re-processed in India out of the scrap or the waste of goods falling within Chapters 39, 54, 55, 56, 59, 64, 83, 84, 86, 87, 90, 91, 92, 93, 94, 95 and 96.	Nil	-	-
... .					

"

Thus, plastic materials reprocessed in India out of the scrap or the waste of goods falling within the chapters mentioned in the Notification would attract exemption clause as the goods are exempt from the whole of the duty of excise leviable thereon or, in other words, they are chargeable to nil rate of duty.

7. On behalf of the Union of India, it is contended that this exemption could not be claimed by the petitioners, in view of the provisions contained in Section 5A of the Central Excise Act, 1944. The relevant portion of Section 5A with Explanation reads as under :-

> " Section 5A. Power to grant exemption from duty of excise.- (1) If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by notification in the Official Gazette, exempt generally either absolutely or subject to such conditions (to be fulfilled before or after removal) as may be specified in the notification, excisable goods of any specified description from the whole or any part of the duty of excise leviable thereon :
>
> Provided, that, unless specifically provided in such notification, no exemption therein shall apply to excisable goods

which are produced or manufactured-

(i) in a free trade zone and brought to any other place in India; or

(ii) by a hundred per cent export-oriented undertaking and allowed to be sold in India.

Explanation.- In this proviso, "free trade zone" and "hundred per cent export-oriented undertaking" shall have the same meanings as in Explanation 2 to sub-section (1) of section 3.

... ... "

8. On behalf of the Union of India, it is submitted that as there is no notification, as contemplated under Section 5A, specifically exempting the excisable goods which are produced or manufactured in a free trade zone and brought to any other place in India, the benefit cannot be granted.

9. On the other hand, on behalf of the petitioners, learned counsel Mr.Thakore submitted that if the benefit is extended, then they are required to pay no duty and, in fact, they are paying the duty. So far as the Customs Tariff Act, 1975, under which the countervailing duty is to be paid, Section 3 of the Act must be read literally as it is. Excise duty leviable on a like article, if produced or manufactured in India, has been clarified by the Explanation clause as "... the excise duty for the time being in force which would be leviable on a like article if produced or manufactured in India, or, if a like article is not so produced or manufactured, which would be leviable on the class or description of articles to which the imported article belongs, and where such duty is leviable at different rates, the highest duty .... " Mr.Thakore has contended that if the goods which are manufactured in India and the excise duty is leviable, then, certainly, under Section 3 of the Customs Tariff Act, 1975, additional duty can be levied. It is an admitted position that the goods manufactured in India, as described, are not subject to levy of additional duty.

10. In view of the Notification read with Section 5A of the Central Excise Act, excisable goods referred in

the notification which are produced or manufactured in territory of India other than in territory of Kandla Free Trade Zone or EPZ are exempted from levy of excise. There is no question of exemption of excise duty on the goods manufactured in the Kandla Free Trade Zone or Export Processing Zone and brought in other parts of India, as no exemption is granted from payment of duty under Section 5A. The petitioners are not claiming exemption from payment of excise duty, but are denying their liability to pay countervailing duty under Section 3 of the Customs Tariff Act, in view of the fact that such goods manufactured in India, are not liable to pay any excise duty. From the submission, it transpires that as the petitioners are manufacturing in Kandla Free Trade Zone or E.P.Z., the Officer has called upon to pay the countervailing duty on the ground that the reprocessing has not been done in India. Except this, there is no other valid reason. As a matter of fact, if article is imported into India, the same shall be liable to duty equal to excise duty for the time being leviable on a like article if produced or manufactured in India. It is an admitted position that on a like article, there is no excise duty, maybe because of exemption. Now, turning to the Circular, it appears that the Revenue is of the opinion that two conditions must be fulfilled, viz., reprocessing must have been done in India, and the goods must have been manufactured from scrap. So far as the second condition is concerned, in paragraph 6 of the affidavit of the Deputy Commissioner of Customs, it is stated as under :-

> "... In the present case, the petitioners are engaged in reprocessing of imported plastics scrap and waste and out of which the goods falling under Chapter 39.01 to 39.14 are produced .... "

Thus, now, the only question required to be decided is whether the manufacture has been done in India or outside the territorial limits of India. Only on the basis that the reprocessing has not been done in India, the petitioners are called upon to pay the duty under the Circular. Kandla Free Trade Zone is a part of India and, therefore, it could not be said by the respondents that the processing has not been done in India. On this aspect, there is no explanation from the Revenue, except that Kandla Free Trade Zone is a specified area carved out for the benefit of manufacturers for export of the goods. Mr.Pandya stated that for legal purposes, Kandla Free Trade Zone and Export Processing Zones are not parts of India. Kandla, and EPZ, though are part of Indian

territory, it is submitted that by a deeming fiction, as the goods are deemed to have been imported, it cannot be said that the KFTZ OR EPZ are in India.

11. We fail to appreciate these submissions. The Customs Act, 1962 as well as the Customs Tariff Act, 1975 extend to the whole of India. The application of these laws, therefore, cannot be restricted by saying that the reprocessing has not been done in India. Section 2(27) of the Customs Act reads as under :-

> "Section 2. Definitions.- In this Act, unless the context otherwise requires,-
>
> ... ...
>
> (27) "India" includes the territorial waters of India;
>
> ... ... "

It is in view of erroneous conclusion that Kandla Free Trade Zone and Export Processing Zone are not within the territory of India the Circular is issued, which is required to be quashed. Since long, the duty is not levied, and, all of a sudden, without considering the problems and legal consequences and the consequences that may follow, the Circular has been issued.

12. Mr.Thakore, learned counsel, drew our attention that by mere Circular, the Assessing Officer should not be directed to assess in a particular fashion. He has relied on a decision of this Court in Indichem v. Union of India, 1996 (88) E.L.T. 35 (Gujarat) and the decision in Pioneer Miyagi Chemicals v. Central Board of Ex. & Cus., New Delhi, 2000 (116) E.L.T. 441 (Madras).

13. So far as the countervailing duty is concerned, the decision of the Apex Court in the case of Hyderabad Industries Ltd. v. Union of India, 1999 (108) E.L.T. 321 (S.C.) is required to be considered. In paragraph 11, the Apex Court has pointed out as under :-

> "... 11. The words "if produced or manufactured in India" does not mean that the like article should be actually produced or manufactured in India. As per the explanation if an imported article is one which has been manufactured or produced, then it must be presumed, for the

purpose of Section 3(1), that such article can likewise be manufactured or produced in India. For the purpose of attracting additional duty under Section 3 on the import of a manufactured or produced article the actual manufacture or production of a like article in India is not necessary. As observed by this Court in Thermax Private Limited v. Collector of Customs, Bombay {1962 (61) E.L.T. 352(S.C.)=(1992) 4 SCC 440} at page 452-453 that Section 3(1) of the Customs Tariff Act "specifically mandates that the CVD will be equal to the excise duty for the time being leviable on a like article if produced or manufactured in India. In other words, we have to forget that the goods are imported, imagine that the importer had manufactured the goods in India and determine the amount of excise duty that he would have been called upon to pay in that event." To our mind the genesis of Section 3(1) of Customs Tariff Act has been brought out in the aforesaid observations of this Court, namely, for the purpose of saying what amount, if any, of additional duty is leviable under Section 3(1) of the Customs Tariff Act, it has to be imagined that the articles imported had been manufactured or produced in India and then to see what amount of excise duty was leviable thereon .... "

(emphasis supplied)

14. In paragraph 15, the Apex Court has pointed out as under :-

"... Apart from the plain language of the Customs Tariff Act, 1975 even the notes to clauses show the legislative intent of providing for a charging section in the Tariff Act, 1975 for enabling the levy of additional duty to be equal to the amount of excise duty leviable on a like article if produced or manufactured in India was with a view to safeguard the interests of the manufacturers in India. Even though the impost under Section 3 is not called a countervailing duty there can be little doubt that this levy under Section 3 is with a view to levy additional duty on an imported article so as to counter-balance

> the excise duty leviable on the like article indigenously made. In other words Section 3 of the Customs Tariff Act has been enacted to provide for a level playing field to the present or future manufacturers of the like articles in India .... "

15. Mr.Thakore submitted that one has to assume that the importer had actually manufactured the goods in India, as pointed out by the Apex Court in Motiram Tolaram v. Union of India, 1999 (112) E.L.T. 749 (S.C.)

16. In view of what we have discussed hereinabove, the only conclusion that can be drawn is that the Circular is not in accordance with law and by such Circular, direction cannot be given to make the assessment in a particular fashion only.

17. In the result, we quash the impugned Circular No.38/2000-Cus dated 10th May, 2000, produced as Annexure `A'. The petitions are accordingly allowed. Rule is made absolute with no order as to costs.

6th July, 2000 (B.C. Patel, J.)

(P.B. Majmudar, J.)

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(apj)